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**DEPARTMENT OF JUSTICE**

**Executive Office For Immigration Review**

**8 CFR Parts 1001 and 1003**

**[EOIR Docket No. 18-0301; A.G. Order No. 4841-2020]**

**RIN 1125-AA83**

**Professional Conduct for Practitioners – Rules and Procedures, and Representation and Appearances**

**AGENCY:** Executive Office for Immigration Review, Department of Justice.

**ACTION:** Notice of proposed rulemaking.

**SUMMARY:** This proposed rule would amend Department of Justice (“Department” or “DOJ”) regulations to allow practitioners to assist individuals with drafting, writing, or filing applications, petitions, briefs, and other documents in proceedings before the Executive Office for Immigration Review (“EOIR”) by filing an amended version of EOIR’s current forms (Form EOIR-27 and Form EOIR-28) noticing the entry of appearance of a practitioner. Those amended forms would also function as a notice of disclosure of legal assistance for practitioners who provide legal assistance but choose not to represent aliens in immigration proceedings, and also a notice of disclosure of preparation by practitioners. The proposed rule would further clarify that the only persons who may file a document with the agency are those recognized as eligible to do business with the agency and those aliens who are filing a document over which the agency has jurisdiction. Also, the proposed rule would make non-substantive changes regarding capitalization and amend outdated references to the former Immigration and Naturalization Service (“INS”).

**DATES:** Electronic comments must be submitted and written comments must be postmarked or otherwise indicate a shipping date on or before [INSERT DATE 30 DAYS FROM DATE OF PUBLICATION IN FEDERAL REGISTER]. The electronic Federal Docket Management System at [www.regulations.gov](http://www.regulations.gov) will accept electronic comments until 11:59 p.m. Eastern Time on that date.

**ADDRESSES:** If you wish to provide any comment regarding this rulemaking, you must submit comments, identified by the agency name and reference RIN 1125-AA83 or EOIR Docket No. 18-0301, by one of the two methods below.

- *Federal eRulemaking Portal:* <http://www.regulations.gov>. Follow the website instructions for submitting comments.

- *Mail:* Paper comments that duplicate an electronic submission are unnecessary. If you wish to submit a paper comment in lieu of electronic submission, please direct the mail/shipment to: Lauren Alder Reid, Assistant Director, Office of Policy, Executive Office for Immigration Review, 5107 Leesburg Pike, Suite 1800, Falls Church, VA 22041. To ensure proper handling, please reference the agency name and RIN 1125-AA83 or EOIR Docket No. 18-0301 on your correspondence. Mailed items must be postmarked or otherwise indicate a shipping date on or before the submission deadline.

**FOR FURTHER INFORMATION CONTACT:** Lauren Alder Reid, Assistant Director, Office of Policy, Executive Office for Immigration Review, 5107 Leesburg Pike, Falls Church, VA 22041, Telephone (703) 305-0289 (not a toll-free call).

## **SUPPLEMENTARY INFORMATION:**

### **I. Public Participation**

Interested persons are invited to participate in this rulemaking by submitting written data, views, or arguments on all aspects of this proposed rule via the one of the methods and by the deadline stated above. All comments must be submitted in English, or accompanied by an English translation. The Department also invites comments that relate to the economic, environmental, or federalism effects that might result from this proposed rule. Comments that will provide the most assistance to the Department in developing these procedures will reference a specific portion of the rule, explain the reason for any recommended change, and include data, information, or authority that support such recommended change.

Please note that all comments received are considered part of the public record and made available for public inspection at [www.regulations.gov](http://www.regulations.gov). Such information includes personally identifying information (such as your name, address, etc.) voluntarily submitted by the commenter.

If you want to submit personally identifying information (such as your name address, etc.) as part of your comment, but do not want it to be posted online, you must include the phrase “PERSONALLY IDENTIFYING INFORMATION” in the first paragraph of your comment and identify what information you want redacted.

If you want to submit confidential business information as part of your comment, but do not want it to be posted online, you must include the phrase “CONFIDENTIAL BUSINESS INFORMATION” in the first paragraph of your comment. You also must prominently identify confidential business information to be redacted within the comment. If a comment has so much

confidential business information that it cannot be effectively redacted, all or part of that comment may not be posted on <http://www.regulations.gov>.

Personally identifying information located as set forth above will be placed in the agency's public docket file, but not posted online. Confidential business information identified and located as set forth above will not be placed in the public docket file. The Departments may withhold from public viewing information provided in comments that they determine may impact the privacy of an individual or is offensive. For additional information, please read the Privacy Act notice that is available via the link in the footer of <http://www.regulations.gov>. To inspect the agency's public docket file in person, you must make an appointment with the agency. Please see the "For Further Information Contact" paragraph above for agency contact information.

The Department may withhold from public viewing information provided in comments that they determine may impact the privacy of an individual or is offensive. For additional information, please read the Privacy Act notice that is available via the link in the footer of <http://www.regulations.gov>.

## **II. Background**

The Immigration and Nationality Act ("INA") provides that aliens appearing before an immigration judge "shall have the privilege of being represented, at no expense to the Government, by counsel of the alien's choosing who is authorized to practice in such proceedings." INA 240(b)(4)(A), 8 U.S.C. 1229a(b)(4)(A); *see also* INA 292, 8 U.S.C. 1362 ("In any removal proceedings before an immigration judge and in any appeal proceedings before the Attorney General from any such removal proceedings . . . the person concerned shall have the privilege of being represented (at no expense to the Government) by such counsel . . . as [the

person concerned] shall choose.”); 8 CFR 1003.16(b) (“The alien may be represented in proceedings before an Immigration Judge by an attorney or other representative of his or her choice in accordance with 8 CFR part 1292, at no expense to the government.”).

DOJ has promulgated regulations establishing rules of procedure and standards of professional conduct governing “practitioners”—i.e., attorneys, law students, law graduates, reputable individuals, and accredited representatives permitted to practice before EOIR. 8 CFR 1003.101(b) (defining practitioner); *id.* 1003.1-8 (Board of Immigration Appeals); *id.* 1003.12-47 (immigration court rules of procedure); *id.* 1003.101-11 (professional conduct for practitioners). Under those regulations, practitioners who represent an individual in proceedings before EOIR must file a Notice of Entry of Appearance as Attorney or Representative Before the Board of Immigration Appeals (“Form EOIR-27”) or a Notice of Entry of Appearance as Attorney or Representative Before the Immigration Court (“Form EOIR-28”). 8 CFR 1003.3(a)(3), 1003.17, 1292.4. Practitioners are subject to disciplinary sanctions if they provide representation before the BIA or the immigration courts and fail to submit a signed and completed Form EOIR-27 or Form EOIR-28 or fail to sign every pleading, application, motion, or other filing in their individual names. 8 CFR 1003.102(t).

Generally, when a practitioner enters a notice of appearance, the practitioner is obligated to represent the individual for the remainder of the proceeding unless the immigration judge or the Board of Immigration Appeals (“Board” or “BIA”) grants that practitioner’s motion to withdraw or substitute counsel. 8 CFR 1003.17, 1003.38, 1292.4. In 2015, however, the Department published a final rule allowing practitioners to enter an appearance for the limited purpose of representing an alien in custody and bond proceedings. Separate Representation for Custody and Bond Proceedings, 80 FR 59500 (Oct. 1, 2015). Practitioners appearing before an

immigration judge may indicate on Form EOIR-28 that their appearance is for “All proceedings,” for “Custody and bond proceedings only,” or “All proceedings other than custody and bond proceedings.” 8 CFR 1003.17(a); Form EOIR-28.

### **III. Public Comments**

On March 27, 2019, the Department published an Advanced Notice of Proposed Rulemaking (“ANPRM”) with 11 questions to solicit public comments regarding whether the Department should allow practitioners who appear before EOIR to engage in limited representation, or representation of a client during only a portion of the case beyond what the regulations currently permit. Professional Conduct for Practitioners, Scope of Representation and Appearances, 84 FR 11446 (Mar. 27, 2019).

The Department received 30 comments<sup>1</sup> in response to the ANPRM. The vast majority of comments were submitted by organizations (16 comments) and individuals (9 comments) who provide legal services to aliens appearing before EOIR, including the American Immigration Lawyers Association (“AILA”), the American Civil Liberties Union (“ACLU”), non-profit legal service providers, immigration law clinics, private immigration attorneys, and law students. Three comments were submitted anonymously, including one by a law student intending to become an immigration attorney. Comments were also submitted by the National Association of Immigration Judges (“NAIJ”) and the Administrative Conference of the United States (“ACUS”).

The comments are summarized below in relation to the specific questions raised in the ANPRM.

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<sup>1</sup> The Department received a total of 32 public comments, 2 of which were duplicates.

*Question 1:* Should the Department permit certain types of limited representation currently impermissible under regulations? If so, to what extent? If not, why not?

#### **A. Advisability of Limited Representation**

The vast majority of the comments—26 of 30—supported allowing practitioners to assist clients in only part of a case. Two of the comments—one by NAIJ and one submitted by a commenter identifying only as a law student—opposed such limited representation. Two comments did not take a clear position.<sup>2</sup>

Several comments supporting limited representation noted that the American Bar Association (“ABA”) and a majority of state bar associations allow the practice. *See* Model Code of Professional Conduct R. 1.2(c) (“A lawyer may limit the scope of the representation if the limitation is reasonable under the circumstances and the client gives informed consent.”); ABA Comm. on Ethics & Professional Responsibility, Formal Op. 472 (2015) (discussing proper attorney communication with a person receiving limited-scope legal services); *but see* “Ghostwriting Controversy: Is there an ethical problem with attorneys drafting for pro se clients?” *ABA Journal* (June 2018) (quoting an attorney regarding the provision of limited representation services without disclosure of such assistance to the court: “The lack of a clear and consistent position by courts and bar associations is one of the substantial challenges facing the profession on this issue. For example, bar associations have typically taken a more favorable view of ghostwriting than have the courts themselves. Even among courts there are differing viewpoints, with federal courts generally viewing ghostwriting less favorably than state courts. Likewise, different states have adopted different views on this issue.”). However, NAIJ, writing in strong opposition to

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<sup>2</sup> One comment expressed concern that the Department would eliminate limited representation for bond and custody proceedings. The other comment suggested that EOIR needed to conduct an extensive study to determine the effects of limited representation on judicial outcomes.

limited representation, stated that while bar associations may theoretically allow limited representation, “NAIJ is not aware of any other state or federal courts allowing for such limited representation,” indicating that it is not workable in practice.

Most of the comments supported limited representation as a means to increase access to counsel.<sup>3</sup> Several commenters pointed to limited representation in the bond and custody context as an illustration of how limited representation can lead to better outcomes for respondents and greater immigration court efficiency. Some commenters pointed to the Department’s past statements when allowing limited representation in custody and bond proceedings. *See Separate Representation for Custody and Bond Proceedings*, 80 FR 59500 (Oct. 1, 2015) (final rule); 79 FR 55660 (Sept. 17, 2014) (proposed rule) (noting that regulations that are expected to encourage more practitioners to agree to represent individuals who would otherwise navigate EOIR’s proceedings on their own would, in turn, benefit the public by increasing the efficiency of the immigration courts). NAIJ cautioned, however, that although limited representation in bond proceedings is appropriate, “respondents are often unaware that they are only hiring attorneys for a limited portion of their case,” and predicted that “[a]llowing attorneys to further limit their representation of respondents in removal proceedings will only lead to additional confusion on the part of the respondents.”

Many commenters asserted that many practitioners are forced to decline to assist respondents because they are unable to commit to full representation for the entirety of the case as required under the current regulations. They noted that some cases involve multiple hearings over a number of years while others might be scheduled too quickly for practitioners to

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<sup>3</sup> Some comments opined that government-funded counsel should be provided. Such suggestions are beyond the scope of this regulation.

sufficiently prepare. These commenters suggested that practitioners would be more likely to assist individuals if they were not automatically committed to representation for the entirety of the proceedings.

Many of the commenters argued that individuals who are represented in proceedings before EOIR achieve better outcomes, with several providing statistics to support their claims. The comments supporting some form of limited representation either stated or implied that individuals who receive assistance in only a portion of their cases will fare better than those who receive no representation. Several comments stated that limited representation may improve the quality of representation and reduce the likelihood that respondents turn to *notarios*<sup>4</sup> or other bad actors. One commenter stated that limited representation would empower dissatisfied respondents to find new counsel and incentivize practitioners to provide quality representation if they wished to be retained for further work in a case. Additionally, commenters noted that practitioners could tailor their practice to matters in which they are the most qualified.

NAIJ disagreed that individuals would be better off with limited representation, arguing that it would result in “an undue and misplaced burden [being] placed on respondents who may not have representation at merit hearings, to account for lacking documentation and missed attorney deadlines set at the master hearings [where a limited representative was present].”

Several comments predicted that limited representation would increase immigration court efficiency because if more respondents are represented, even in a limited manner, immigration

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<sup>4</sup> “In many Latin American countries, the term ‘notario publico’ (for ‘notary public’) [or its short form, “notarios”] stands for something very different than what it means in the United States. In many Spanish-speaking nations, ‘notarios’ are powerful attorneys with special legal credentials. In the [United States], however, notary publics are people appointed by state governments to witness the signing of important documents and administer oaths. ‘Notarios publico,’ are not authorized to provide [persons before EOIR and DHS] with any legal services related to immigration.” United States Citizenship and Immigration Services, Common Scams, <http://www.uscis.gov/avoid-scams/common-scams> (last updated Nov. 21, 2014) (emphasis added).

judges would not have to devote as much time, care, and attention during proceedings to make sure that respondents understand the proceedings. Some commenters also argued that with limited representation, relief applications may be presented more clearly and comprehensively, which would make it easier for immigration judges to decide the applications. One comment suggested that limited representation may improve appearance rates of non-detained respondents because respondents may feel more confident appearing if they have assistance of counsel.

NAIJ disagreed, predicting that immigration judges would have “to start hearings anew when a new attorney appears at the individual hearing contesting issues having been concluded at the master or previous hearing,” and judges would have to devote additional time to consider revised applications and motions for continuances.

## **B. Scope of Limited Representation**

Commenters in support of limited representation offered a variety of options for expanding limited representation. They suggested both limited representation without restrictions and limited representation restricted to certain respondents, practitioners, types of proceedings, or discrete parts of proceedings. One or more commenters recommended the following specific options for enacting limited representation:

- Limited representation, including appearances and filings, in all instances (e.g., permitting limited appearances for each scheduled hearing in a given case);
- limited representation, including appearances and filings, except for particularly vulnerable clients (e.g., juveniles and respondents with mental health issues would not be permitted to be represented in a limited capacity);
- limited appearances for vulnerable clients only in the scope of motions to change venue, motions to reopen, and motions to terminate;

- limited representation, including appearances and filings, for each form of relief (e.g., allowing a practitioner to represent a client only for the client's application for cancellation of removal and another practitioner to represent the same client only for the client's application for asylum);
- limited appearances in the form of filing motions and applications for relief only; limited appearances for preparing and filing each "discrete" piece of a respondent's case (e.g., dispositive motions or pleadings);
- limited representation for preparing and filing certain motions only (such as motions to change venue, motions to continue, motions to consolidate or sever, motions to re-calendar, and motions for stay);
- limited representation in-person for a master calendar hearing only, highlighting the possibility that unrepresented respondents might concede charges without understanding the implications of such concessions;
- limited representation in-person for credible and reasonable fear review hearings;
- limited representation permitted by pro bono practitioners, nonprofit practitioners, or EOIR-accredited representatives only;
- limited representation in-person as a pro bono representative for one day only; and
- limited representation in-person by all practitioners without distinction between profit and non-profit representation.

*Question 2:* Should limited representation be permitted to allow attorneys or representatives to appear at a single hearing in proceedings before EOIR, possibly leaving the

respondent without representation for a subsequent hearing on the same filing? If so, to what extent? If not, why not?

Eighteen commenters expressed support for limited representation to permit a practitioner to appear at a single hearing or discrete segments of a case, such as pleadings, arguments on a motion drafted by the practitioner, or an individual hearing on the merits of an application for relief. These comments echoed the reasons given above in support of limited representation generally. They asserted that respondents and immigration courts would benefit from limited representation for a single hearing or segment of the case, even if a respondent had no representation at subsequent hearings. One supporter cautioned that appearances for a single hearing may not be appropriate in circumstances where an individual hearing is scheduled shortly after a master calendar hearing, leaving little time for a subsequent practitioner to prepare, or where a matter requires multiple hearings.

Three commenters opposed limited representation for a single hearing. These commenters expressed concern that immigration proceedings involve multiple hearings over a number of years, and respondents could compromise their case if they later had to proceed pro se and were unable to maintain representation throughout their proceedings. Commenters argued that pro se respondents, in the time between limited representation and an individual hearing, could become confused about their responsibilities regarding filing deadlines, be unable to sufficiently prepare their cases, or could be unaware of changes in the law or new forms of relief that become available.

*Question 3:* Should limited representation be permitted to allow attorneys or representatives to prepare or file a pleading, application, motion, brief, or other document without providing further representation in the case? If not, why not? If so, should attorneys or

representatives be required to identify themselves as the author of the document or should anonymity (i.e., ghostwriting) be permitted?

Nineteen comments advocated allowing practitioners to prepare or file a pleading, application, motion, brief, or other document without having to enter an appearance and without being obligated to assist the client in any other portion of the case. Only one comment advocated that EOIR allow uncredited “ghostwriting,” where “attorneys should indicate that an attorney provided assistance but should not be required to identify themselves.” The other commenters argued that the practitioner should provide identifying information. For example, AILA suggested, “[t]he lawyer should identify themselves by providing the same information on the document as if the lawyer were to enter an appearance, but there should be no formal requirement to enter an appearance that would create a future obligation to appear in court or perform other work.”

Commenters opposing anonymity argued that anonymity “would not allow for accountability if any individuals are committing any types of fraud or unethical techniques.” Other comments raised concerns that ghostwriting could preclude a respondent’s ability to reopen proceedings based on ineffective assistance of counsel pursuant to *Matter of Lozada*, 19 I&N Dec. 637 (BIA 1988). *See id.* at 639 (stating that “[w]here essential information is lacking, it is impossible to evaluate the substance of” an ineffective assistance claim).

Three commenters opposed a broad rule allowing practitioners to assist on documents with no obligation to continue representing the individual. One commenter raised concerns that often, hearings are set “for years later” after all documents have been submitted, and during that time “the law could change or new relief could become available.” The commenter worried that the respondent could thus “be left unprotected and ignorant of the law.” The commenter

acknowledged, however, that certain acts would not raise such concerns, such as assisting in motions to change venue, motions to continue, or motions for status docket.

*Question 4:* If limited representation is permitted in proceedings before EOIR, should an attorney or representative be required to file a Notice of Entry of Appearance regardless of the scope of the limited representation? If so, should a form separate from the EOIR-27 and EOIR-28 be created for such appearances?

Fourteen comments addressed this issue, with the majority supporting amendment of the current Form EOIR-27 and Form EOIR-28 to include an option for limited representation or the creation of a separate form. Some suggested that the form include the respondent's signature consenting to the limited representation or a space to define the scope of the limited representation. In the context of assistance in preparing documents, six commenters suggested the inclusion of identifying information about the practitioner with a filed document or completion of the preparer block on an application in order to preclude the submission of an appearance form. Only one of the commenters opposed filing a form, although the commenter suggested that the practitioner should make a statement on the record about the limited appearance and include a document in the record regarding the respondent's consent to limited representation.

*Question 5:* If limited representation is permitted, should attorneys or representatives certify to EOIR, either through a form or filings made, that the alien has been informed about the limited scope of the representation?

Of the 14 submissions that addressed the issue, the vast majority (11 submissions) opined that either practitioners should certify they have informed the individual about the limited scope of representation (9 submissions), or the judge should explain the limited scope of representation

on the record (2 submissions). The commenters argued that this precaution was necessary to “create accountability for attorneys and representatives” and prevent clients from being “misled to think that the attorney or representative would be representing them from beginning to end.”

Commenters offered different suggestions as to the form of such certification. One commenter suggested a simple checkbox on EOIR’s Notice of Entry of Appearance form would be sufficient. Others called for more detailed certifications. For example, the DeNovo Center for Healing and Justice argued that the practitioner should “be required to explain the limitations orally and in writing to the client in both English and the client’s native language and obtain the client’s informed consent to the limitation in a writing signed by both the client and the attorney.”

Two comments argued that certification is not necessary, because attorneys are already ethically obligated to inform clients as to the nature and scope of representation. Another comment opined that requiring certification to EOIR “could intrude upon privileged attorney-client communications,” especially where the client is a child. This commenter stated that state bar associations are better equipped to enforce safeguards with respect to limited representation than a notification requirement.

*Question 6:* If limited representation is permitted in proceedings before EOIR, to what extent should such attorneys or representatives have access to the relevant record of proceedings?

Sixteen comments argued that practitioners who engage in limited representation should have access to the relevant record of proceedings in order to competently assess cases, advise respondents, and take the appropriate actions. Commenters stated that practitioners making limited appearances should have the same access to the record of proceedings as those engaging

in full representation; that access for practitioners, whether engaging in limited or full representation, should be codified in this regulation; and that access should be easier and faster.

Six of the comments stated that the Department should make access to the record of proceedings for practitioners engaging in limited representation available upon entry of an appearance or with written consent or authorization of the client.

One commenter stated that limited representation practitioners should not continue to have access to the record once the scope of the limited representation has completed, whereas another comment suggested that practitioners should have access to track the outcomes of matters, such as a motion, in which they provided limited representation.

*Question 7:* To what extent could different approaches for limited representation impair the adjudicative process or encourage abuse or other misconduct that adversely affects EOIR, the public, or aliens in proceedings, or lead to increased litigation regarding issues of ineffective assistance of counsel?

*Question 8:* What safeguards, if any, should be implemented to ensure the integrity of the process associated with limited representation in proceedings before EOIR, and to prevent any potential abuse and fraud?

Four comments predicted that allowing some form of limited representation would generally not negatively affect EOIR, the public, or respondents in proceedings. Most of the comments, however, recognized that limited representation could create some potential problems and recommended safeguards to address them.

For example, several comments raised concerns that aliens may not understand the limited scope of representation, either due to confusion on the alien's part or unethical behavior on the part of attorneys. Eleven commenters suggested that either practitioners should certify

they have informed the individual about the limited scope of representation (9 submissions), or the judge should explain the limited scope of representation on the record (2 submissions). Two comments argued that EOIR should not place additional burdens on practitioners, as rules of professional conduct already require attorneys to inform their clients about the limited nature of representation. Another comment argued that action by EOIR could intrude upon privileged attorney-client communications. One commenter additionally suggested that EOIR also establish a hotline or complaint system so that respondents and petitioners could report fraud and abuse by practitioners.<sup>5</sup>

Six submissions raised concerns that attorneys “might overcharge greatly for simple matters” or “may not adjust their fees downward when they engage in limited representation which could drain the available resources of a respondent’s family.” Commenters offered a range of suggestions for addressing the issue. One comment suggested EOIR should regulate the fees that practitioners may charge for limited representation. Another comment recommended that EOIR publish a range of suggested fees. Nine comments opposed any interference by EOIR in fee arrangements. Several of these commenters argued that rules of professional responsibility already prohibit attorneys from charging exorbitant fees. Two comments urged the Department to restrict limited representation to pro-bono attorneys or to organizations and accredited representatives approved by EOIR’s Office of Legal Access Programs in order to avoid price-gouging or other unscrupulous behavior.

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<sup>5</sup> The Department notes that practitioners, aliens, and others may currently submit complaints about fraudulent activity to EOIR’s Fraud Program via email at [EOIR.Fraud.Program@usdoj.gov](mailto:EOIR.Fraud.Program@usdoj.gov) or by phone at 877-388-3840. *See* EOIR, *Fact Sheet: EOIR’s Fraud and Abuse Prevention Program* (June 2017), available at <https://www.justice.gov/eoir/page/file/eoirfraudprogramfactsheetjune2017/download>.

Additionally, several commenters worried that notices and decisions might be mailed to the attorney of record only, and once the attorney's role ends, the respondent would not receive these documents. These commenters were concerned that this in turn could lead to an increase in absentia removal orders due to lack of notice to respondents, and they suggested that notices be mailed to both the representative and the client.

As discussed under Question 1, commenters disagreed strongly as to whether limited representation would impair or improve the efficiency of immigration courts and the Board. The comments opposing did not suggest any modifications, only that the Department should not expand limited representation.

*Question 9:* What kinds of constraints or legal concerns with respect to limited representation may arise under state rules of ethics or professional conduct for attorneys who are members of the bar in the various states?

Of the twelve comments received addressing this question, many commenters did not foresee any constraints or legal concerns arising under state rules of ethics or professional conduct with respect to limited representation. However, some commenters expressed concerns that states might determine that their rules prohibit limited representation and may possibly implement sanctions for licensed attorneys in their states if they engage in limited representation in immigration court.

One comment opined that a limited appearance rule might be difficult to implement while maintaining the standard of attorney ethical obligations given varied rules in different states. For example, ethical practitioners might not engage in limited representation because of uncertainty over whether the practitioner's state of licensure would consider such conduct ethical. Limited representation might impede a practitioner's obligation to exercise due diligence in

representation and zealous advocacy, and, moreover, a succession of practitioners involved in a given respondent's case might also make it difficult to comply with client confidentiality.

*Question 10:* Should EOIR provide that practitioners, as a condition of representing aliens in a limited manner, be required to agree to limit their fees in charging for their services?

Nine of the 11 comments that addressed this question opposed EOIR interfering with fee arrangements or setting any limit on fees as a condition of permitting practitioners to represent respondents and petitioners on a limited basis. Five comments acknowledged that respondents and petitioners in immigration proceedings are particularly vulnerable to overcharging, but noted that state bar rules and EOIR's own regulations already regulate against unreasonable fees. *See* 8 CFR 1003.102(a) (prohibiting "grossly excessive" fees). These comments generally stressed that the Department should give practitioners and clients the latitude to determine appropriate fees, depending on the scope of the limited representation, within the confines of these rules.

Two comments stated that EOIR should require practitioners to limit their fees for limited representation. One of these comments expressed concern that practitioners would charge respondents and petitioners fees for full representation when the scope of the work was limited. The other comment suggested that EOIR offer a suggested range of fees for limited representation services, rather than a set amount, to account for the varying amount of work that the practitioner would need to perform in individual cases.

*Question 11:* The Department is interested in gathering other information or data relating to the issue of expanding limited appearances in EOIR proceedings. Are there any additional issues or information not addressed by the Department's questions that are important for the Department to consider? Please provide as much detail as possible in your response.

The majority of commenters supported their positions with citations to outside sources in the scope of their responses to questions 1 through 10 and, in some instances, in response to this question in particular. The Department appreciates the additional information and has taken it into consideration.

#### **IV. Discussion of Proposed Changes**

After reviewing the public comments received in response to the ANPRM, the Department is issuing this proposed rule, which would amend §§ 1001.1, 1003.17, and 1003.102 of chapter V of title 8 of the Code of Federal Regulations. The proposed rule would not expand in-court limited representation beyond the existing provisions for custody and bond proceedings.<sup>6</sup> Instead, the Department proposes to allow practitioners to assist pro se individuals with drafting, writing, or filing applications, motions, forms, petitions, briefs, and other

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<sup>6</sup> In reaching this decision, DOJ agrees with many of the concerns raised that limited representation would likely lead to confusion on the part of individuals in proceedings before EOIR, multiply the opportunities for fraud and abuse, and potentially complicate and lengthen immigration proceedings with comparatively little offsetting benefit to individuals and without any benefit to the government. Almost 75 percent of cases pending at least six months have representation, nearly 90 percent of cases in which the respondent is seeking asylum have representation, and over 80 percent of appeals to the BIA have representation. Thus, allowing limited representation would have only a marginal impact, if any, on the overall representation rates in immigration proceedings, and that marginal impact would not offset either the significant increased operational burdens or the increased likelihood of fraud, abuse, and confusion. Additionally, DOJ notes that allowing limited representation would likely place a substantial administrative burden on EOIR. Finally, DOJ is concerned that allowing for limited representation could have unintended negative consequences for individuals appearing before EOIR. DOJ believes that an alien is best served by an attorney or representative who commits to represent the individual through the entire case. But a rule allowing an attorney or representative to appear piecemeal at hearings in a case could create perverse incentives. An attorney or representative may see no reason to commit himself to representing a client through an entire case if he or she could, through limited appearances, preserve the ability to exit the case at any time. These concerns are lessened, however, in the context of drafting, writing, or filing applications, motions, forms, petitions, briefs, and other documents. Written filings provide more discrete assistance and are more easily ascribed to a specific practitioner at a specific moment rather than having to parse arguments made by multiple practitioners at multiple hearings. Further, there is less likelihood of confusion by a respondent inherent in written documents because there is a written record to which a respondent can refer, rather than trying to rely on recalling what happened at a prior hearing. Finally, there is less likelihood of written filings complicating or lengthening hearings because the extent of the assistance is clearer in a written document and provides more concrete evidence of a practitioner's expectations, which are, in turn, made clearer to the immigration judge and the respondent. In short, the inherently limited nature of written assistance and the greater transparency involved in preparing written documents lessen the above concerns sufficiently that the Department feels limited written assistance, if properly disclosed as provided in the proposed rule, is appropriate in immigration proceedings.

documents with EOIR, as long as the nature of the assistance is disclosed on an amended Notice of Entry of Appearance as Attorney or Representative Before the Board of Immigration Appeals or a Notice of Entry of Appearance as Attorney or Representative Before the Immigration Court (Forms EOIR-27 and EOIR-28, collectively, “NOEA forms”). Further, the proposed rule would not allow such continued practice or preparation without additional disclosure following the same procedure.<sup>7</sup> Under this scenario, EOIR would not recognize the practitioner as a representative of record for the individual or case, but would maintain, in the record of proceeding, the practitioner’s information as associated with the relevant filing. Moreover, while individuals would be permitted to obtain such assistance, the proposed rule would not create any right or entitlement for aliens to obtain such assistance, nor would it permit EOIR funds to be used for such assistance. Practitioners who assist a pro se alien without representing that alien before EOIR would be required to file the amended NOEA form disclosing the nature of that assistance, either practice or preparation, and related information.

Consistent with this change, the Department proposes to amend the definitions of “practice” and “preparation” to distinguish between acts that involve the provision of legal advice or exercise of legal judgment (practice) and acts that consist of purely non-legal assistance (preparation). Specifically, under the proposed rule, an individual would engage in practice when he or she provides legal advice or uses legal judgment and either appears in person before EOIR, or drafts or files documents with EOIR. Preparation, by contrast, would be limited

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<sup>7</sup> For example, a practitioner could draft a motion for a continuance for an alien and attach an NOEA form for the filing of that limited purpose. While that ends the practitioner’s immediate obligation under this proposed rule, there is no prohibition against the practitioner later assisting the alien with the completion of an application for relief as long as the practitioner again follows the outlined procedure for notice of appearance.

to completing forms or applications without the provision of legal advice or the exercise of legal judgment—for example, by serving purely as a transcriber or translator.<sup>8</sup>

Under the proposed rule, where the individual is *pro se* and the practitioner’s role consists solely of non-representative practice or preparation, the practitioner would be required to submit an amended NOEA form listing his or her name, contact information, bar number (“BAR#”) or EOIR identification number (“EOIR ID#”), as applicable<sup>9</sup>, work done, and fees charged, as well as to complete an attestation and certification on the NOEA form attesting that the practitioner has explained, and the individual understands, the limited nature of the assistance.

Additionally, the proposed rule would make conforming changes to DOJ’s regulations concerning limited representation in bond proceedings. The proposed rule would clarify that advocating in open court on behalf of a respondent for purposes of custody or bond proceedings constitutes practice and requires the filing of a notice of appearance. This clarification eliminates any confusion regarding practitioners who may appear in court and advocate on behalf of a respondent without clearly identifying themselves as the legal representative of the respondent. Finally, the proposed rule would make minor, non-substantive changes regarding capitalization of the term “immigration judge” and outdated references to the former INS.

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<sup>8</sup> The Department notes that it expects practitioners to engage only rarely in acts of preparation, because of the inherent likelihood that a practitioner will exercise legal judgment or provide legal advice while performing otherwise ministerial tasks such as serving as a scribe in filling out a form.

<sup>9</sup> A practitioner who is an attorney who has not represented an alien in proceedings before EOIR in the past and who, as a result, does not have an EOIR ID# would provide his or her BAR#. However, a practitioner who is an attorney who has previously registered with EOIR and been assigned an EOIR ID# would be required to provide that EOIR ID# on the updated NOEA form. A practitioner who is a registered, fully accredited representative, *see* 8 CFR 1292.1(a)(4), would also be required to provide the representative’s EOIR ID# on the updated form. An attorney would not be required to register with EOIR and obtain an EOIR ID# in order to be able to submit the updated NOEA form and engage in non-representative practice or preparation.

### **A. “Practice” Versus “Preparation”**

The Department proposes to amend its regulations to more clearly differentiate between legal activities undertaken by attorneys and legal representatives, and non-legal activities that may be undertaken by lay persons.

DOJ’s current regulations provide overlapping definitions for “practice” and “preparation.” 8 CFR 1001.1(i), (k). The regulations state that practice includes preparation, and preparation constitutes practice. *Id.* Both acts involve the provision of legal advice, with preparation being a subset of practice. *See* 8 CFR 1001.1(k) (defining “preparation” as “study of the facts of a case and the applicable laws, coupled with the giving of advice and auxiliary activities”); *id.* 1001.1(i) (defining “practice” as appearing before EOIR either in person or through the “preparation” or filing of papers). Moreover, the standards of professional conduct do not vary based on whether a representative engages in preparation or practice.

The Department believes it would be more useful to distinguish between acts that involve the provision of legal advice or exercise of legal judgment (practice) and acts that consist of purely non-legal assistance (preparation). Specifically, under the proposed rule, an individual would engage in practice when he or she provides legal advice or uses legal judgment and either appears in person before EOIR or writes or files documents with EOIR. “Practice” would thus encompass the actions typically regarded as the practice of law related to any matter or potential matter, before or with EOIR, and including both in-court and out-of-court representation. Such actions include legal research, the exercise of legal judgment regarding specific facts of a case, the provision of legal advice as to the appropriate action to take, drafting a document to effectuate the advice, or appearing on behalf of a respondent or petitioner, in person or through a filing.

“Preparation,” by contrast, would be limited to the completion of forms with information provided by the respondent or petitioner without any legal judgment, analysis, advice, or consideration as to the propriety of the form for a respondent or petitioner’s circumstances. For example, individuals who appear before EOIR may have help completing applications or forms with such basic, factual information as their name, address, place of birth, etc. These activities do not involve the provision of legal advice or application of legal knowledge or judgment and thus constitute preparation. This proposed rule would not relieve any such preparer from the requirements that the preparer complete the preparer identification or disclosure on the forms containing such request for information. Further, it is important to note that those assisting an individual in completing forms as preparation must take care to avoid providing legal advice or exercising legal judgment regarding a specific case, as such actions would constitute practice and would trigger the additional requirements to which practice is subject as compared to preparation. For example, an individual who advises a client on what details to include in an asylum application in order to establish past persecution, or learns information about an alien’s case and suggests taking a particular action, would be engaging in practice. The Department also notes that those not actively licensed in law or fully accredited through EOIR’s recognition and accreditation process should not be providing legal judgment or advice, as such actions could constitute the unauthorized practice of law.

Finally, the current definition of “representation” merely cross-references the definitions of “preparation” and “practice.” 8 CFR 1001.1(m). In light of the changes to those definitions, the proposed rule also makes concomitant changes to the definition of “representation” to ensure consistency among the definitions. It also makes clear, consistent with the revised definition of

“practice,” that an individual may not take legal action on behalf of an alien in open court in immigration court proceedings without representing that alien throughout the entire action.

#### **B. Assistance to Pro Se Individuals**

The proposed rule would not expand limited representation beyond the existing provisions for custody and bond proceedings. Instead, the Department proposes to allow practitioners to assist pro se individuals with drafting, writing, or filing applications, motions, forms, petitions, briefs, and other documents with EOIR, provided that such assistance is clearly disclosed on an amended NOEA form. The proposed rule would not allow practitioners to advocate in open court on behalf of a respondent, however, without being recognized as the respondent’s legal representative in immigration proceedings and without filing an NOEA form noticing the practitioner’s entry of appearance.

In conjunction with the proposed rule, EOIR will amend each of its two NOEA forms to include a section limited to situations in which a practitioner has provided assistance in the form of non-representative practice, but does not wish to take on actual representation in the EOIR proceeding, and a section limited to the rare situation in which a practitioner has engaged in preparation.

In all cases in which a practitioner intends to represent an individual in immigration proceedings, including all cases in which a practitioner advocates on behalf of an individual in open court, the practitioner would complete the section of the amended NOEA form relating to representation similar to the current practice with the existing EOIR Forms 27 and 28.

In cases where a practitioner engages in non-representative practice, the practitioner would complete one of the new portions of the NOEA form disclosing the legal assistance and additional information discussed below. The practitioner would also attest that the alien

understands the limited nature of the assistance being provided, and the alien would certify that he or she understands the limited nature of the practitioner's role. The NOEA form would then be filed with EOIR concomitantly with whatever filing was the subject of the legal assistance.

In all cases in which an individual, either a practitioner or non-practitioner, assists an alien with filling out an application form that requires disclosure of the assistance—e.g., an Application for Asylum and for Withholding of Removal (Form I-589); Application to Register Permanent Residence or Adjust Status (Form I-485); Application for Suspension of Deportation (Form EOIR-40); Application for Cancellation of Removal for Certain Permanent Residents (Form EOIR 42A); Application for Cancellation of Removal and Adjustment of Status for Certain Nonpermanent Residents (Form EOIR-42B); or, Application for Suspension of Deportation or Special Rule Cancellation of Removal (Form I-881)—the person assisting would still be required to disclose the assistance on the form where indicated.

In the unlikely or rare situation in which a practitioner engages in preparation that is not based on a form that already requires disclosure of the assistance, the practitioner would complete one of the new portions of the NOEA form disclosing the preparation and the additional information discussed below. The practitioner would also attest that the alien understands the preparatory nature of the assistance provided, and the alien would certify his or her understanding. The NOEA form would then be filed with EOIR concomitantly with whatever filing was the subject of the preparation. In all other cases—i.e., in which a non-practitioner engages in preparation—no separate form would need to be filed; however, any preparer instructions or disclosure would need to be completed upon assistance of any kind with a form requesting that information.

Thus, the proposed rule covers scenarios in which practitioners or non-practitioners provide only preparation to assist a pro se alien only by drafting, writing, or otherwise completing documents for filing with EOIR; and the filing<sup>10</sup> of those documents.<sup>11</sup>

### **1. Scope of Permitted Assistance**

This proposed rule would not change the current requirement that a practitioner who wishes to appear in person before EOIR on behalf of an individual must enter a notice of appearance and remains obligated to represent his or her client unless and until an immigration judge permits withdrawal from representation. In this way, the proposed rule would ensure continuity of representation in cases in which a practitioner has entered an appearance while also providing pro se respondents with the opportunity to receive assistance with pleadings, applications, petitions, motions, briefs, or other documents, consistent with the clearer definitions of practice and preparation, from individuals who would not be required to enter a full appearance and incur a continuing representation obligation.

Under the proposed rule, EOIR would consider individuals to be pro se if a practitioner has not filed an NOEA form noticing that the practitioner is serving as the individual's legal representative in immigration proceedings. The filing of an amended NOEA form indicating that

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<sup>10</sup> Filing in this context refers to the legal submission of documents on behalf of a party, rather than to the ministerial act of filing itself. Thus, a practitioner who simply provides to the court a paper submission prepared by another practitioner as a convenience to that practitioner has not engaged in practice or preparation merely by the ministerial act of filing the document.

<sup>11</sup> If an individual who does not have an EOIR-ID# (a "non-practitioner") assists with such a document, the non-practitioner would need to comply with the document's instructions, but would not be permitted to file the document with EOIR; the alien could file the document, or a practitioner with knowledge of the contents could file the document by submitting it with an NOEA form. This concept is contemplated in 8 CFR 1292.1 wherein law students and law graduates must file a statement that they are appearing under the "direct supervision" or "supervision," respectively, of a licensed attorney or accredited representative. As such, the supervising attorney or representative would be able to review the substance of the document for which they are principally responsible as the supervisor, and sign and submit an NOEA. This process would help to ensure that EOIR receives filings only from aliens on their own cases or from attorneys and fully-accredited representatives who have completed the requirements of eRegistration.

a practitioner has engaged in non-representative practice or preparation would not alter the alien's representation status. As with all pro se respondents, the individuals would remain responsible for their own representation while in court, including receiving notice of upcoming hearings and deadlines. The Department believes that this will help address commenters' concerns that notices and decisions might be sent to representatives who are no longer on the case, instead of being sent to the petitioner or respondent.

Further, EOIR would not recognize a practitioner as an attorney or other representative for the individual unless the practitioner filed an NOEA form for all proceedings or appropriate limited representation related to custody and bond proceedings. The proposed rule neither creates any right or entitlement for alien to obtain such assistance nor provides for Department funds to be put toward that purpose. The Department believes this may help mitigate concerns expressed by NAIJ that limited representation would lead to individuals filing multiple motions for continuance in order to replace counsel who only represent the individual for a short time.

## **2. Amended NOEA Forms**

### **a. Disclosure of Legal Assistance**

For cases involving non-representative practice or preparation, the revised NOEA forms would require the practitioner to provide his or her name, contact information, BAR# or EOIR ID# (as applicable), general nature of work done, and fees charged, as well as to complete an attestation and certification on the NOEA form attesting that the practitioner has explained, and the individual understands, the limited nature of the assistance.<sup>12</sup>

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<sup>12</sup> Attorneys and fully accredited representatives must register with EOIR's electronic registry. EOIR assigns registered users an EOIR ID number. EOIR only assigns EOIR ID numbers to attorneys and fully accredited representatives. EOIR does not assign EOIR ID numbers to other representatives, such as law students, law graduates, reputable individuals, and accredited officials. *See* 8 CFR 1292.1(f).

Only practitioners are affected by the proposed rule.<sup>13</sup> Typically, if an alien has a non-practitioner assist in the purely clerical task of completing blank spaces on printed forms, there would be no need to file an NOEA form. The non-practitioner, however, still would be required to follow any applicable form instructions for completing the preparer's block.

In adopting these disclosure requirements, the Department agrees with those comments warning against "ghostwriting." Ghostwriting occurs when an unidentified individual assists with, drafts, or writes pleadings, applications, petitions, motions, briefs, or other documents on behalf of a respondent or petitioner, which are filed with EOIR without disclosing the identity of the person who provided assistance. Ghostwritten documents can contain false or fraudulent information, sometimes unbeknownst to respondents and petitioners. They often present substandard, inaccurate, or boilerplate work products. Ghostwriting harms the parties to EOIR proceedings and undermines the integrity of proceedings, candor to the tribunal, and accountability. *See, e.g., Villagordoa Bernal v. Rodriguez*, No. 16-cv-152- CAS, 2016 WL 3360951, at \*7 (C.D. Cal. June 10, 2016) ("[T]he parties are reminded that ghostwriting of pro se filings is, of course, inappropriate and potentially sanctionable conduct." (citing *Ricotta v. California*, 4 F. Supp. 2d 961, 986 (S.D. Cal. 1998))); *Tift v. Ball*, No. 07-cv-276- RSM, 2008 WL 701979, at \*1 (W.D. Wash. Mar. 12, 2008) ("It is therefore a violation for attorneys to assist pro se litigants by preparing their briefs, and thereby escape the obligations imposed on them under Rule 11."); *Laremont-Lopez v. S.E. Tidewater Opportunity Ctr.*, 968 F. Supp. 1075, 1078-79 (E.D. Va. 1997) (explaining that ghostwriting causes confusion regarding representation, interferes with the administration of justice, constitutes a misrepresentation to the court under

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<sup>13</sup> "Non-lawyer immigration specialists, visa consultants, and 'notarios,' are *not* authorized to represent parties before an Immigration Court." Immigration Court Practice Manual, chs. 2.1 and 2.7 (Sept. 26, 2019). Nothing in the proposed rule is intended to allow legal assistance by unauthorized individuals.

Rule 11, and while “convenient for counsel,” disrupts the proper conduct of proceedings); *Clarke v. United States*, 955 F. Supp. 593, 598 (E.D. Va. 1997) (“Notably, the true author of plaintiff’s putatively pro se pleadings and supporting documents appears to have had formal legal training. Ghost-writing by an attorney of a ‘pro se’ plaintiff’s pleadings has been condemned as both unethical and a deliberate evasion of the responsibilities imposed on attorneys by Federal Rule of Civil Procedure 11. . . . Thus, if in fact an attorney has ghost-written plaintiff’s pleadings in the instant case, this opinion serves as a warning to that attorney that this action may be both unethical and contemptuous.”), *vacated on other grounds* by 162 F.3d 1156 (4th Cir. 1998) (table); *Johnson v. Board of County Com’rs of County of Fremont*, 868 F. Supp. 1226, 1231-32 (D. Col. 1994) (“Moreover, such undisclosed participation by a lawyer that permits a litigant falsely to appear as being without professional assistance would permeate the proceedings. The pro se litigant would be granted greater latitude as a matter of judicial discretion in hearings and trials. The entire process would be skewed to the distinct disadvantage of the nonoffending party . . . . Having a litigant appear to be pro se when in truth an attorney is authoring pleadings and necessarily guiding the course of the litigation with an unseen hand is ingenuous to say the least; it is far below the level of candor which must be met by members of the bar.”), *aff’d*, 85 F.3d 489 (10th Cir. 1996). In short, most federal courts condemn the practice of ghostwriting without disclosure of professional legal assistance:

But federal courts have handed down numerous decisions holding that the ghostwriting lawyer breaches a number of ethical duties contained in the current ABA Model Rules of Professional Conduct (MRPC) (or its earlier iterations) or state rules of professional responsibility. These include arguments that a lawyer ghostwriter breaches the duty of candor to the tribunal by making false statements to the court. Some courts go beyond the violation of the candor requirement, holding that to ghostwrite pleadings is an act of fraud, misrepresentation, or deceit. They cite sections of MRPC Rule 8.4, which states that “[i]t is professional misconduct for a

lawyer to: (a) violate or attempt to violate the Rules of Professional Conduct, knowingly assist or induce another to do so, or do so through the acts of another; . . . (c) engage in conduct involving dishonesty, fraud, deceit or misrepresentation; [or] (d) engage in conduct that is prejudicial to the administration of justice.”

Jona Goldschmidt, *Ghosting*, 102 *Judicature* 3 (2018) (collecting cases) (footnotes omitted).

Ghostwriting is closely related to, and often a vehicle for, *notarios*<sup>14</sup> and other bad actors. These individuals either seek to deceive and mislead respondents, petitioners, and EOIR or, with the acquiescence of respondents and petitioners, seek to perpetuate fraud in and undermine EOIR proceedings. Accordingly, the Department proposes to follow the approach of federal courts regarding ghostwriting, based on concerns not only of misrepresentation to the tribunal regarding whether a respondent is truly pro se but also in order to protect respondents from the unique and significant negative impact *notarios* and other bad actors have on them and their cases in immigration proceedings generally.<sup>15</sup>

DOJ believes that the proposed requirements may reduce the ability of *notarios* and other bad actors to operate in immigration proceedings through ghostwriting. Respondents and petitioners, through the proposed rule and education efforts, would know to avoid the assistance of practitioners or other bad actors who are unwilling to identify themselves on documents with which they assist. Practitioners or other bad actors’ refusal to do so would be a clear sign that the respondent or petitioner should seek assistance elsewhere. Further, the identification requirement would enable respondents, petitioners, EOIR, and other authorities to properly address allegations of ineffective assistance of counsel or other issues related to the quality and

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<sup>14</sup> See note 4, *supra*. “Notario” is the short form of “notario publico” and, in the US immigration context, it means someone who is only a notary public but is holding him-/herself out as a “notary public” to prey upon the cultural difference in meaning and authority between the two positions.

<sup>15</sup> For these reasons, the Department does not endorse the conclusion of ABA Formal Opinion 07-446 that ghostwriting did not present a pro se litigant with an unfair benefit.

substance of the limited representation, which may violate EOIR's Rules of Professional Conduct or state bar rules.

The proposed rule would also require practitioners to disclose the fees they charge when disclosing assistance. The Department agrees with those commenters who identified the risk that unscrupulous attorneys and representatives who seek to overcharge may pose to vulnerable individuals. The Department also agrees with those commenters who argue against EOIR setting fee schedules—whether mandatory or suggested. The Department believes that requiring practitioners to disclose their fees when disclosing out-of-court assistance strikes a reasonable middle ground. Such a disclosure requirement would act as a deterrent to overcharging and, thus, aid in protecting potentially vulnerable individuals. It would also facilitate EOIR's efforts to enforce its Rules of Professional Conduct prohibiting practitioners from charging "grossly excessive" fees for their services. 8 CFR 1003.102(a). The Department does not intend, however, to use the information collected for any purpose outside of the Department's System of Records Notice<sup>16</sup> or to involve itself in the fee arrangements between practitioners and clients.

#### **b. Certification and Attestation**

Upon issuance of a final rule on this topic, the Department would also amend its NOEA forms to include—for cases involving non-representative practice and preparation—a practitioner's attestation that he or she explained to the alien the limited scope of the assistance being provided and that the practitioner believes the alien understood the limited representation. It would also require a certification by the individual verifying that he or she understands the

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<sup>16</sup> The Department's System of Record Notice ("SORN") provides for system information to be used for "conducting disciplinary investigations and instituting disciplinary proceedings against immigration practitioners." *See Notice of New System of Records*, 64 FR 49237 (Sept. 10, 1999). Grossly excessive fees discovered through the established complaint process may result in evaluation of this filing within the bounds of the investigation and the use of the information under the SORN.

limited nature of the assistance. In adopting these requirements, the Department agrees with those comments that reasoned that a certification and attestation requirement would help “create accountability for attorneys and representatives” and prevent clients from being “misled to think that the attorney or representative would be representing them from beginning to end.” This new attestation, while always presumed from practitioners under applicable ethics rules, could help deter fraud; a practitioner may be wary of submitting a document with a false attestation to a federal agency. Further, the certification requirement will help protect practitioners from unfounded complaints of ineffective assistance of counsel.

The Department notes that nothing in the amended NOEA forms requires practitioners to provide details as to legal strategy. Accordingly, contrary to some comments, the additional attestation would not intrude upon attorney-client privileged information.<sup>17</sup>

### **C. Conforming Changes to Custody and Bond Proceedings**

The proposed rule would make conforming changes to the provisions governing limited appearances for custody and bond proceedings, requiring the disclosure of non-representative practice or preparation by practitioners in those proceedings.

### **D. Professional Conduct for Practitioners**

Consistent with the changes to the definitions of “practice,” “preparation,” and “representation” in the proposed rule, and with the allowance for non-representative practice with disclosure, the proposed rule would also amend 8 CFR 1003.102(t) to provide that a practitioner who engages in practice or preparation as the terms are defined in § 1001.1(i) and (k)

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<sup>17</sup> The Department notes that other jurisdictions that allow for limited representation similarly require such certification. *See, e.g.*, D. Kan. Rule 83.5.8(a) (establishing that a lawyer may limit the scope of representation in civil cases if the limitation is reasonable under the circumstances and the client gives informed consent in writing); Administrative Order No. 2019, 01, T.C. (May 10, 2019) (allowing for limited representation in United States Tax Court and requiring that practitioners file with the court a “Limited Entry of Appearance” form that “contains an executed acknowledgement by petitioner(s)”).

and fails to submit a signed and completed NOEA form as required by § 1003.17 or § 1003.38 would be subject to disciplinary sanction in the public interest. The current version of 8 CFR 1003.102(t) is premised on confusing definitions of “practice” and “preparation” and requires a pattern or practice of failing to submit an NOEA form before disciplinary action may be taken. In light of the clearer definitions of “practice” and “preparation” in the proposed rule and the allowance of non-representative practice, the Department views the “pattern or practice” requirement as no longer necessary in order to appropriately enforce the rules of professional conduct for practitioners. Moreover, because practitioners may engage in non-representative practice outside of court under the proposed rule, the importance of the disclosure requirements of the NOEA forms for both aliens and immigration judges is heightened, and the damage from just one instance of failing to file the appropriate form is accordingly greater. Consequently, the proposed rule deletes the requirement that there must be a pattern or practice of failing to file NOEA forms before a disciplinary sanction may result.

The Department of Homeland Security (“DHS”) maintains its own definitions of practice, preparation, and representation in 8 CFR 1.2 that are similar, though not identical, to the definitions utilized by the Department in 8 CFR 1001.1. DHS also relies on the categories enumerated in 8 CFR 1003.102 as a basis to impose disciplinary sanctions on individuals who practice before it pursuant to 8 CFR 292.3; however, 8 CFR 1003.102(t) cross-references only the Department’s definitions of practice, preparation, and representation in 8 CFR 1001.1, and not DHS’s definitions. Thus, the Department’s proposal to change those definitions to account for activities unique to court proceedings, such the drafting of motions or briefs with electing to represent an alien in open court, may unintentionally impede DHS’s ability to discipline those who practice before it. Accordingly, the Department is also amending 8 CFR 1003.102(t) to

make clear that it also applies to the relevant definitions regarding practice, preparation, and representation before DHS in 8 CFR 1.2.

Finally, the proposed rule makes conforming changes to 8 CFR 1003.102(u) to make clear that practice provided by 8 CFR 1001.1(i)(2) may still be subject to disciplinary sanctions if the practice indicates a substantial failure to competently and diligently represent the client.

#### **E. Access to Records of Proceedings**

The proposed rule would not expand access to records of proceedings beyond the current law. Records of proceedings typically contain sensitive information protected from third-party disclosure by the Privacy Act, asylum confidentiality regulations, and other laws. Existing mechanisms, such as the Freedom of Information Act (“FOIA”), are sufficient for third parties to obtain access to such records. Under current practice, the record of proceedings is readily available for review by the alien and the alien’s attorney or representative of record. Moreover, except in rare cases involving classified information or the issuance of a protective order or in cases involving in absentia hearings, every immigration court order and every document considered by an immigration judge in adjudicating a respondent’s case is served on the respondent. Thus, an individual who wishes to assist an alien in immigration proceedings may quickly and easily obtain information or documents about a case directly from the alien.

Alternatively, that individual may obtain access to the record of proceedings by choosing to serve as the respondent’s representative of record or by filing a FOIA request. Against the backdrop of applicable privacy and confidentiality laws, the presence of these multiple avenues of access to records of proceedings by those wishing to assist aliens in immigration proceedings strikes the proper balance between facilitating legal assistance and protecting sensitive information of respondents.

## **V. Regulatory Requirements**

### **A. Regulatory Flexibility Act**

The Attorney General, in accordance with the Regulatory Flexibility Act (5 U.S.C. 605(b)), has reviewed this regulation and, by approving it, certifies that this proposed rule will not have a significant economic impact on a substantial number of small entities. Practitioners who wish to represent aliens in person in immigration proceedings are already required to submit an NOEA form, and all individuals who prepare an application form for an alien are already required to disclose such preparation if the form requires it. Although this proposed rule will require practitioners who provide legal assistance to aliens outside of court but do not formally represent them in court to submit an NOEA form, most, if not all, such practitioners are already well-versed in submitting the form for cases in which they do represent an alien in immigration court proceedings. Further, the number of practitioners who solely provide preparation for a filing that does not otherwise require disclosure of such preparation will be exceedingly small because most practitioners do not solely provide preparation and all common immigration applications already require disclosure of preparation. Moreover, the form is not expected to be time-consuming and will involve only providing information the involved practitioner or other person providing assistance already knows well – *i.e.* their own contact information.

### **B. Unfunded Mandates Reform Act of 1995**

This proposed rule will not result in the expenditure by state, local and tribal governments, in the aggregate, or by the private sector, of \$100 million or more in any one year, and it will not significantly or uniquely affect small governments. Therefore, no actions were deemed necessary under the provisions of the Unfunded Mandates Reform Act of 1995.

### **C. Congressional Review Act**

This proposed rule is not a major rule as defined by section 804 of the Congressional Review Act. This proposed rule will not result in an annual effect on the economy of \$100 million or more; a major increase in costs or prices; or significant adverse effects on competition, employment, investment, productivity, innovation, or on the ability of U.S.-based enterprises to compete with foreign-based enterprises in domestic and export markets.

### **D. Executive Orders 12866, 13563, and 13771**

The Department has determined that this rulemaking is a “significant regulatory action” under section 3(f) of Executive Order 12866, Regulatory Planning and Review. Accordingly, this proposed rule has been submitted to the Office of Management and Budget (“OMB”) for review. This proposed rule has been drafted and reviewed in accordance with Executive Order 12866, “Regulatory Planning and Review,” section 1(b), Principles of Regulation; in accordance with Executive Order 13563, “Improving Regulation and Regulatory Review,” section 1(b), General Principles of Regulation; and in accordance with Executive Order 13771, “Reducing Regulation and Controlling Regulatory Costs.”

Executive Orders 12866 and 13563 direct agencies to assess all costs and benefits of available regulatory alternatives and, if regulation is necessary, to select regulatory approaches that maximize net benefits (including potential economic, environmental, public health, and safety effects, distributive impacts, and equity). Executive Order 13563 emphasizes the importance of using the best available methods to quantify costs and benefits, reducing costs, harmonizing rules, and promoting flexibility. Similarly, Executive Order 13771 requires agencies to manage both the public and private costs of regulatory actions.

The rule imposes no new costs on either the Government or on practitioners or aliens. Immigration court personnel, including immigration judges, are already well-versed and familiar with reviewing existing NOEA forms. Further, as practitioners are expected to adhere to the rules of practice in fulfillment of ethical and professional responsibility obligations, the proposed rule should not increase disciplinary actions against practitioners or otherwise increase the time spent by immigration court personnel reviewing filings.

As discussed above, practitioners who wish to represent aliens in person in immigration proceedings are already required to submit an NOEA form, and all individuals who prepare an application form for an alien are already required to disclose such preparation if the form requires it. Thus, this proposed rule adds no new requirements to most immigration court filings or for practitioner behavior. Although this proposed rule will require practitioners who provide legal assistance to aliens outside of court but do not formally represent them in court to submit an NOEA form, most, if not all, such practitioners are already well-versed in submitting the form for cases in which they do represent an alien in immigration court proceedings. Further, the number of practitioners who solely provide preparation for a filing that does not otherwise require disclosure of such preparation is negligible. Moreover, the form, which mirrors existing forms, will not add any significant time burden and will involve only a writing of information the involved practitioner or other person providing assistance already knows well – i.e., their own contact information.

Thus, for the reasons explained above, the expected costs of this proposed rule are likely to be de minimis. This proposed rule is accordingly exempt from Executive Order 13771. *See* Office of Mgmt. & Budget, *Guidance Implementing Executive Order 13771: Reducing Regulation and Controlling Regulatory Costs* (2017).

#### **E. Executive Order 13132**

This proposed rule will not have substantial direct effects on the States, on the relationship between the Federal Government and the States, or on the distribution of power and responsibilities among the various levels of government. Therefore, in accordance with section 6 of Executive Order 13132, the Department has determined that this proposed rule does not have sufficient federalism implications to warrant the preparation of a federalism summary impact statement.

#### **F. Executive Order 12988**

This proposed rule meets the applicable standards set forth in sections 3(a) and 3(b)(2) of Executive Order 12988.

#### **G. Paperwork Reduction Act of 1995**

Under the Paperwork Reduction Act of 1995 (“PRA”), no person is required to respond to a federal collection of information unless the agency has in advance obtained a control number from OMB. In accordance with the PRA, the Department has submitted requests to OMB to revise the currently approved information collections contained in this proposed rule: Form EOIR-26, Notice of Appeal from a Decision of an Immigration Judge; Form EOIR-27, Notice of Entry of Appearance as Attorney or Representative Before the Board of Immigration Appeals; and Form EOIR-28, Notice of Entry of Appearance as Attorney or Representative Before the Immigration Court. These information collections were previously approved by OMB under the provisions of the PRA, and the information collections were assigned OMB Control Number 1125-0002 for the EOIR-26, 1125-0005 for Form EOIR-27, and 1125-0006 for Form EOIR-28. Through this notice of proposed rulemaking, the Department invites comments from the public and affected agencies regarding the revised information collections. Comments are encouraged

and will be accepted for 60 days in conjunction with the proposed rule. Comments should be directed to the address listed in the ADDRESSES section at the beginning of this preamble. Comments should also be submitted to the Office of Management and Budget, Office of the Information and Regulatory Affairs, Attention: Desk Officer for EOIR, New Executive Building, 725 17<sup>th</sup> Street, NW, Washington DC 20053. This process is in accordance with 5 CFR 1320.10.

If you have any suggestions or comments, especially on the estimated public burden or associated response time, or need a copy of the proposed information collection instruments with instructions or additional information, please contact the Department as noted above. Written comments and suggestions from the public and affected agencies concerning the proposed collections of information are encouraged.

Comments on the proposed information collections should address one or more of the following four points: (1) evaluate whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility; (2) evaluate the accuracy of the agency's estimate of the burden of the proposed collection of information, including the validity of the methodology and assumptions used; (3) enhance the quality, utility, and clarity of the information to be collected; or (4) minimize the burden of the collection of information on those who are to respond, including through the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology (e.g., permitting electronic submission of responses).

Based on the proposed rule, the currently approved information collection instruments will need to be revised. The revised Form EOIR-27 will continue to be used by practitioners to enter an appearance before the Board of Immigration Appeals on appeals related to immigration

judge decisions, DHS officer decisions, fines, and disciplinary proceedings. The revised Form EOIR-28 will continue to be used by practitioners to enter an appearance before the immigration court to represent aliens in removal or bond proceedings or to represent an individual in a practitioner disciplinary proceeding. Forms EOIR-27 and EOIR-28 also will be revised to allow practitioners to disclose non-representative practice or preparation as described above. All of the information required under the current information collection will continue to be required by the revised form. The Department invites comments as to whether additional changes need to be made to the forms to more clearly attest to consent received for representation, where appropriate, and certification that the alien understands the scope of the limited representation being provided.

Under the current information collection, which is not used for limited representation, the estimated average time to review and complete the forms is six minutes. The Department estimates that when disclosing non-representative practice or preparation, the average time to review and complete the forms will be eight minutes rather than the current six minutes, adding an additional two minutes to provide fee information and complete the attestation and certification. The total public burden of these revised collections are estimated to be 6,728,232 burden hours annually ((for Form EOIR-27, 53,816 respondents (FY 2019) x 1 response per respondent x 8 minutes per response = 7,175.5 burden hours) + (for Form EOIR-28, 787,213 respondents (FY 2019) x 1 response per respondent x 8 minutes per response = 104,961.73 burden hours) = 112,137.23 burden hours). The number of estimated responses was derived from the average annual responses received for the past three fiscal years for each form. Eight minutes was used for all responses to estimate the maximum burden possible to the public. The Department expects that the total number of responses received annually for each form may

increase as the rule creates additional appearance types than what was previously permitted before EOIR, but is unable to estimate at this time how much of an increase is expected since receipts may not increase at all but just change in type of appearance.

There are no capital or start-up costs associated with these information collections. There are also no fees associated with filing these information collections. The estimated public cost is a maximum of \$6,355,938.20. This amount is reached by multiplying the burden hours (112,137.23) by \$56.68, which represents the current median hourly wage for attorneys, as set by the Bureau of Labor Statistics. The amount \$6,355,938.20 represents the maximum estimate of cost burden. EOIR notes that this form is submitted by an immigration practitioner, including attorneys or accredited representatives; as such, respondents are not likely to retain a practitioner separately to assist them in filling out the forms. Forms EOIR-27 and EOIR-28 burden expectation is two minutes more per form than the current estimate of six minutes per form, so the burden hours noted are inflated as compared to the increase of burden on the public.

## **List of Subjects**

### **8 CFR Part 1001**

Administrative practice and procedure, Immigration.

### **8 CFR Part 1003**

Administrative practice and procedure, Aliens, Immigration, Legal services, Organizations and functions (Government agencies).

Accordingly, for the reasons set forth in the preamble, the Department of Justice proposes to amend parts 1001 and 1003 of chapter V of title 8 of the Code of Federal Regulations as follows:

## **PART 1001 – DEFINITIONS**

1. The authority citation for part 1001 continues to read as follows:

**Authority:** 5 U.S.C. 301; 8 U.S.C. 1101, 1103; Pub. L. 107-296, 116 Stat. 2135; Title VII of Pub. L. 110-229.

2. Amend § 1001.1 by revising paragraphs (i), (k), and (m) to read as follows:

**§ 1001.1 Definitions.**

\* \* \* \* \*

(i) The term *practice* means the act or acts of giving of legal advice or exercise of legal judgment on any matter or potential matter before or with EOIR and

(1) Appearing in any case in person on behalf of another person or client in any matter before or with EOIR, including the act or acts of appearing in open court and submitting, making, or filing pleadings, briefs, motions, forms, applications, or other documents or otherwise making legal arguments or advocating on behalf of a respondent in open court, or attempting to do any of the foregoing on behalf of a respondent; or

(2) Assisting in any matter before or potentially before EOIR through the drafting, writing, filing or completion of any pleading, brief, motion, form, application, or other document that is submitted to EOIR, on behalf of another person or client.

\* \* \* \* \*

(k) The term *preparation* means the act or acts consisting solely of clerical assistance in the completion of forms, applications, or documents that are to be filed with or submitted to DHS, or any immigration judge or the Board, where such acts do not include the provision of legal advice or exercise of legal judgment; however, *preparation* before DHS is defined in accordance with 8 CFR 1.2. A practitioner may engage in preparation without engaging in practice or representation provided the preparation does not include the provision of legal advice and is disclosed in accordance with 8 CFR 1003.17 or 8 CFR 1003.38.

\* \* \* \* \*

(m) The term *representation* before EOIR includes practice as defined in paragraph (i) of this section; however, *representation* before DHS is defined in accordance with 8 CFR 1.2. A practitioner may not engage in practice as defined in paragraph (i)(1) of this section without engaging in representation. A practitioner may engage in practice as defined in paragraph (i)(2) of this section without engaging in representation provided the practice is disclosed in accordance with 8 CFR 1003.17 or 8 CFR 1003.38.

\* \* \* \* \*

#### **PART 1003 – EXECUTIVE OFFICE FOR IMMIGRATION REVIEW**

3. The authority citation for part 1003 continues to read as follows:

**Authority:** 5 U.S.C. 301; 6 U.S.C. 521; 8 U.S.C. 1101, 1103, 1154, 1155, 1158, 1182, 1226, 1229, 1229a, 1229b, 1229c, 1231, 1254a, 1255, 1324d, 1330, 1361, 1362; 28 U.S.C. 509, 510, 1746; sec. 2 Reorg. Plan No. 2 of 1950; 3 CFR, 1949-1953 Comp., p. 1002; section 203 of Pub. L. 105-100, 111 Stat. 2196-200; sections 1506 and 1510 of Pub. L. 106-386, 114 Stat. 1527-29, 1531-32; section 1505 of Pub. L. 106-554, 114 Stat. 2763A-326 to -328.

4. Revise § 1003.17 to read as follows:

### **§ 1003.17 Appearances.**

(a) In any proceeding before an immigration judge in which the alien is represented, the attorney or representative shall file Form EOIR-28 with the immigration court and shall serve a copy of Form EOIR-28 on the DHS as required by § 1003.32(a). The entry of appearance of an attorney or representative in a custody or bond proceeding shall be separate and apart from an entry of appearance in any other proceeding before the immigration court. In each case where the respondent is represented, as defined in 8 CFR 1001.1(m), and the attorney or representative has filed Form EOIR-28, every pleading, application, motion, or other filing shall be signed by the practitioner of record in his or her individual name. An attorney or representative may file Form EOIR-28 indicating whether the entry of appearance as an attorney or representative is for custody or bond proceedings only, for all proceedings other than custody and bond proceedings, or for all proceedings. Such Notice of Entry of Appearance must be filed and served even if a separate Notice of Entry of Appearance has been filed with DHS for an appearance before DHS, or with EOIR for appearances before EOIR.

(b) No individual may engage in practice as defined in 8 CFR 1001.1(i), including exercising or waiving a respondent's rights, or otherwise advocating in a legal capacity on behalf of a respondent in open court without filing Form EOIR-28 noticing that individual's entry of appearance as a respondent's legal representative.

(c) Withdrawal or substitution of an attorney or representative engaged in representation may be permitted by an immigration judge during proceedings only upon oral or written motion submitted without fee. No such withdrawal motion is necessary when the original notice of entry of appearance was for a noted purpose limited to custody and bond proceedings or proceedings other than custody or bond.

(d) A practitioner who engages in practice as defined in 8 CFR 1001.1(i) but not representation, must file Form EOIR-28 disclosing the practice. A practitioner who engages in preparation as defined in 8 CFR 1001.1(k) must file Form EOIR-28 disclosing the preparation. No subsequent withdrawal motion is necessary for Form EOIR-28 filed under this paragraph (d), but a new Form EOIR-28 must be filed for each subsequent act of preparation or practice that does not constitute representation.

(e) Any practitioner required to submit Form EOIR-28 under this paragraph must comply with all instructions on Form EOIR-28. The practitioner must complete the appropriate section on Form EOIR-28 indicating whether the practitioner is representing the individual, has engaged in practice but not representation, or has engaged in preparation. For practitioners who have engaged in practice but not representation or in preparation, Form EOIR-28 must include an attestation from the practitioner that he or she has communicated to the client in a language understood by that client the exact parameters of the professional services or relationship agreed to and a certification from the client and that the client has understood this communication, as described in the instructions to Form EOIR-28.

(f) Nothing in this section shall be construed as relieving the preparer of an application or form that requires disclosure of the preparation from complying with the disclosure requirements of the application or form, or as relieving a practitioner from the requirement to file Form EOIR-28 with the immigration court when the practitioner has engaged in practice as defined in 8 CFR 1001.1(i).

(g) Nothing in this section shall be construed as limiting an individual's privilege of being represented (at no expense to the government) by counsel authorized to practice by EOIR in removal proceedings before an immigration judge.

\* \* \* \* \*

5. Amend § 1003.38 by revsing paragraph (g) and adding paragraphs (h) through (l) to read as follows:

**§ 1000.38 Appeals.**

\* \* \* \* \*

(g) In any proceeding before the Board in which the alien is represented, as defined in 8 CFR 1001.1(m), the attorney or representative shall file Form EOIR-27 with the Board and shall serve a copy of Form EOIR-27 on the DHS as required by 8 CFR 1003.32(a). In each case where the respondent is represented, and the attorney or representative has filed Form EOIR-27, every motion or other filing shall be signed by the practitioner of record in his or her individual name.

(h) No individual may engage in practice as defined in 8 CFR 1001.1(i), including exercising or waiving a respondent's rights or otherwise orally advocating in a legal capacity on behalf of an alien, without filing Form EOIR-27 noticing that individual's entry of appearance as a respondent's legal representative.

(i) Withdrawal or substitution of an attorney or representative may be permitted by the BIA only upon written motion submitted without fee.

(j) For cases at the BIA:

(1) A practitioner who engages in practice as defined in 8 CFR 1001.1(i), but not representation, must file Form EOIR-27 disclosing the practice.

(2) A practitioner who engages in preparation as defined in 8 CFR 1001.1(k) must file Form EOIR-27 disclosing the preparation.

(3) No subsequent withdrawal motion is necessary for an EOIR-27 filed under paragraph (j) of this section, but a new EOIR-27 must be filed for each subsequent act of preparation or of practice that does not constitute representation.

(k) Any practitioner required to submit Form EOIR-27 under this section must comply with all instructions on Form EOIR-27. The practitioner must complete the appropriate section on the Form indicating whether the practitioner is representing the individual, has engaged in practice but not representation, or has engaged in preparation. For practitioners who have engaged in practice but not representation or in preparation, Form EOIR-27 must include an attestation from the practitioner that he or she has communicated to the client in a language understood by that client the exact parameters of the professional relationship being agreed to and a certification from the client that the client has understood this communication, as described in the instructions to Form EOIR-27.

(l) Nothing in this paragraph shall be construed as relieving the preparer of an application or form that requires disclosure of the preparation from complying with the disclosure requirements of the application or form, or as relieving a practitioner from the requirements to file Form EOIR-27 with the BIA when the practitioner has engaged in practice as defined in 8 CFR 1001.1(i).

6. Amend § 1003.102 by:

- a. Removing the words “Immigration Court” wherever they appear and adding, in their place, the words “immigration court”;
- b. Removing the words “Immigration Courts” wherever they appear and adding, in their place, the words “immigration courts”;
- c. Revising paragraphs (t) and (u) to read as follows:

**The revisions read as follows:**

**§ 1003.102 Grounds.**

\* \* \* \* \*

(t) Engages in representation as that term is defined in 8 CFR 1.2 or 1001.1(m), practice as the term is defined in 8 CFR 1.2 or 1001.1(i), or preparation as that term is defined in 8 CFR 1.2 or 1001.1(k), and fails to submit a signed and completed Form EOIR-27, Form EOIR-28, or Form G-28 in compliance with applicable rules and regulations, including 8 CFR 1003.17 and 1003.38. In each case where the respondent is represented and the attorney or representative has filed a Notice of Entry of Appearance as Attorney or Representative, every pleading, application, motion, or other filing shall be signed by the practitioner of record in his or her individual name.

(u) Repeatedly drafts notices, motions, briefs, or claims that are later filed with DHS or EOIR that reflect little or no attention to the specific factual or legal issues applicable to a client's case, but rather rely on boilerplate language indicative of a substantial failure to competently and diligently represent the client; or

\* \* \* \* \*

Dated: September 2, 2020.

**William P. Barr,**

*Attorney General.*

[FR Doc. 2020-20045 Filed: 9/29/2020 8:45 am; Publication Date: 9/30/2020]